

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

ORDER

Case No. 2006-7

In Re:)
Appeal of Triad Mechanical Contractors)
_____)

This matter comes before us on an appeal from Triad Mechanical Contractors (Triad). Triad was a subcontractor for Huss, Inc. on a bid concerning a restoration project on a building at the Medical University of South Carolina (MUSC). The award of the project was made to NBM, Inc. The case came before us for a hearing on October 6, 2006. A Motion for Summary Judgment made by NBM, Inc. was granted by the Panel after prehearing arguments. Triad was represented by Eric Laquiere, Esquire, NBM, Inc. was represented by Stan Barnett, Esquire, and the Chief Procurement Officer (CPO) was represented by Keith McCook, Esquire.

BACKGROUND

The case comes to us with a somewhat convoluted procedural history. On November 1, 2005, MUSC sent out an Invitation for Bids (IFB) for restoration work to be done on the Anderson House on its campus. On December 8, 2005, the bids were opened and on December 19, 2005, Huss, Inc. was issued the Notice of Intent to Award. Triad was the subcontractor on that bid. On December 29, 2005, NBM protested the proposed award contending Huss was not responsible because Huss and Triad, as a subcontractor, did not meet the mandatory experience requirements. On January 12, 2006, MUSC reevaluated the bid and determined that Huss did not meet the minimum experience requirements and cancelled the bid to Huss. Huss filed a protest and on February 3rd, and as a result, the CPO issued an order reinstating the award to Huss on the

basis that MUSC did not have the authority to cancel an award on its own at this stage. On February 9, 2006, NBM appealed the CPO's decision to the Panel.

On March 15, 2006, the CPO heard the December 29th protest of NBM regarding the original award to Huss. On May 11, 2006, the CPO issued his order overturning the award to Huss. He found Huss to be non-responsible because the qualification statement it provided did not provide sufficient information upon which MUSC could conclude that Huss met the mandatory minimum experience requirements of the solicitation. On May 21, Huss requested review by the Panel.

On May 24, 2006, NBM withdrew its February 9th appeal to the Panel. On June 12, 2006, Huss withdrew its appeal to the Panel. On June 13, 2006, the Panel dismissed both pending requests for review from Huss and from NBM.

On June 28, 2006, MUSC issued its Notice of Intent to Award the restoration contract to NBM. On July 12, 2006, Huss and Triad, as a subcontractor, filed a protest with the CPO. The CPO upheld the award to NBM.

On August 17, 2006, Triad requested review by the Panel. Huss did not appeal the CPO's decision. Triad seeks to have the award to NBM rescinded for three reasons: NBM was non-responsive because it did not submit a qualification statement within 48 hours of MUSC's receipt of bids as required by 00201-OSE, Paragraph 9.4 of the IFB; (2) MUSC's determination that Huss was non-responsible was erroneous because it violated SC Reg. 19-445.2125 (E) in that MUSC did not prepare a written responsibility determination; and (3) MUSC should not have waived the requirement that NBM should submit its 00451 Qualification Statement within 48 hours of the receipt of bids.

On October 2, 2006, NBM filed a Motion for Summary Judgment before us.

MOTION FOR SUMMARY JUDGMENT

A Motion for Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 475 S.E. 2d 747, 748 (1996). In determining whether any genuine issues of material fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). Summary judgment should be granted "when plain, palpable and undisputed facts exist on which reasonable minds cannot differ." Bayle v. South Carolina Dep't of Transportation, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

The Panel has historically allowed and ruled on motions for Summary Judgment. Protest of Love Chevrolet Co., Panel Case No. 1999-7; Protest of Todays Business Systems, Panel Case No. 1994-2.

NBM, Inc. contends this matter does not have any general issues of material and that the dispute in the matter is solely one of the interpretation of the law. Triad agrees that there are no issues of material fact, but feels that the interpretation of law requires the Panel to send the case back for re-bid.

DISCUSSION

Triad contends that NBM was non-responsive because it did not submit a qualification statement within 48 hours of MUSC's receipt of bids. The IFB established in Document 00450 certain minimum experience requirements also know as special standards of responsibility. The IFB notified bidders that the "Contractor's Qualification Statements will be required within 48 hours of receipt of bid." Bids were opened on December 8th, 2005 by MUSC. On December 9,

2006, Ms. Powers asked Huss to submit its Qualifications Statement by December 12th at 9:00 a.m. After reviewing the submission, Ms. Powers asked for additional information which was submitted by Huss on December 15 and 16. On December 19, 2006, a notice of intent to award the contract to Huss was issued. Subsequently, this award was withdrawn and the Notice of Intent to Award was issued to NBM. NBM then submitted the statement within 48 hours of the request after it received the Notice of Intent to Award. It did not submit the statement within 48 hours of its initial delivery of the bid to MUSC.

The CPO found that this was a matter of responsibility rather than responsiveness. Regardless, the question becomes whether as a matter of law it was acceptable that NBM did not submit the qualification statement within 48 hours after its bid was delivered to MUSC. We disagree with Triad that the responsiveness language of S.C. Code Ann. 11-35-1410 (7) applies. That statute says, “ ‘Responsive bidder or offeror’ means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.” The qualification statement was not required to be submitted with the bid. If MUSC wanted the qualification statement from every bidder, it would have required that it be submitted with the bid. However, it did not. Instead, MUSC clearly wanted to ensure the responsibility of the low bidder and they wanted to be able to do it in a time manner. S.C. Code Regs. §19-445.2125(B) allows the agency to request the information from the bidder if necessary. It is nonsensical to think it would have been required from every bidder 48 hours after the bids were due. If that was the situation, it would have been required at the time the bid was submitted.

Triad also believes that MUSC’s determination that Huss was non-responsible was erroneous because it violated SC Reg. 19-445.2125 (E) in that MUSC did not prepare a written responsibility determination. S.C. Code Reg. 19-445.2125 (E) states, “ If a bidder or offeror who

otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the findings shall be prepared by the Chief Procurement Officer or the procurement officer of the governmental body.”

On May 11, 2006, the Chief Procurement Officer issued a full written determination setting out exactly why Huss was non-responsible. Clearly, it meets the requirements of the statute. Triad contends the May 11 order only found that the person making the determination was erroneous and not that Huss and Triad were non-responsible. That issue was appealed to the Panel after the May 11 order and was then withdrawn. That is not before us. There was no new IFB in June 2006, only a new Notice of Intent to Award. Therefore, the May 11, 2006 order is applicable. As a matter of law, pursuant to S.C. Code Reg. 19-445.2125 (E) a written determination of nonresponsibility was prepared by the Chief Procurement Officer.

Thirdly, Triad has asserted that MUSC’s waiver of the requirement that NBM submit its qualification statement was erroneous as this constituted a modification of the IFB. As stated above, the qualifications statement was not required until 48 hours after notification of the bid award. NBM met that requirement. There was no waiver.

CONCLUSION

The parties have agreed that the facts of this matter are not in dispute. Accordingly, since no genuine issues of material fact exist, and viewing all evidence and all reasonable inferences in the light most favorable to Triad, NBM is entitled to an order granting summary judgment in its favor.

Based on the foregoing,

IT IS THEREFORE ORDERED that the Motion for Summary Judgment is granted.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
By its vice chairman:

Willie D. Franks

Willie Franks

This 19th day of October, 2006

Columbia, South Carolina